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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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12 Nocher Enterprises, Inc. a) CV 18-3897-RSWL (JEMx)
13 California corporation,)
14 Plaintiff,) ORDER re: Defendants'
15 v.) Motion to Dismiss for
16) Lack of Personal
17) Jurisdiction [17] and
18) Motion to Dismiss for
19) Failure to State a Claim
20 AVENTUS OUTREACH, LLC, a) [18]
21 Florida limited liability)
22 company; OLIVER DAWOUD, an)
23 individual; AVENTUS BIO)
24 LABS, INC., a Florida)
25 corporation; and AVENTUS)
26 HEALTH, LLC, a Florida)
27 limited liability company,)
28
29 Defendants.

30 Plaintiff Nocher Enterprises, Inc. ("Plaintiff")
31 filed the instant Action against Defendants Aventus
32 Outreach, LLC ("Outreach"); Aventus Health, LLC
33 ("Health"); Oliver Dawoud ("Dawoud"); and Aventus Bio
34 Labs, Inc. ("Bio Labs") (collectively, "Defendants"),
35 for damages arising from an alleged breach of contract
36

1 and negligent misrepresentation. Currently before the
2 Court is Defendants' Motions to Dismiss for (a) lack of
3 personal jurisdiction [17] and (b) failure to state a
4 claim [18]. Having reviewed all papers submitted
5 pertaining to these Motions, the Court **NOW FINDS AND**
6 **RULES AS FOLLOWS:**

7 I. BACKGROUND

8 A. Factual Background

9 Plaintiff is a California corporation doing
10 business in California. First Am. Compl. ("FAC") ¶ 1,
11 ECF No. 13. Defendants Outreach and Health are Florida
12 limited liability companies, Bio Labs was a Florida
13 corporation,¹ and Dawoud is an individual and the
14 principal/owner of Outreach. Id. ¶¶ 2-5. The nature
15 of Defendants' business is "testing medical specimens
16 from all over the United States at their Florida
17 laboratories." Defs.' Mot. to Dismiss re Personal
18 Jurisdiction ("Jurisdiction Mot.") 1:13-14, ECF No. 17.
19 Defendants "held themselves out as one and [the] same
20 entity" and under the "same banner and trade name of
21 Aventus Biolabs a/k/a AventusBiolabs.com." FAC ¶ 7.

22 Plaintiff alleges that on April 19, 2017,
23 Defendants invited Plaintiff to "enroll its accounts"
24 with Defendants for the sale and service of "specimens"
25 to Defendants as ordered by Defendants. Id. ¶ 12. At
26

27 ¹ According to Defendants, Bio Labs is a dissolved
28 corporation that never did any business. Jurisdiction Mot. at
11:27-28.

1 that time, Defendants promised to pay Plaintiff a
2 specified percentage of the net payment that Defendants
3 would receive from testing the specimens. Id.
4 Defendants also promised to account for their
5 collections by providing Plaintiff with summarized
6 reports indicating the amount collected per claim,
7 provider name, and claim date, and an access to an
8 online portal to verify collection data. Plaintiff
9 alleges that in reliance on Defendants' promises, it
10 started delivering specimens to Defendants. Id.

11 According to Plaintiff, Defendants avoided doing
12 business with California entities due to state laws but
13 made an exception for Plaintiff because of the expected
14 large volume of business it would generate for
15 Defendants. Id. ¶ 11. The primary source of specimens
16 provided by Plaintiff were from California providers²
17 (e.g., hospitals, doctors, and rehabilitation centers).
18 Id. ¶ 13.

19 As of August 2017, Defendants paid Plaintiff
20 \$170,000 for approximately 600 specimens out of the
21 11,000 specimens Plaintiff provided, which Plaintiff
22 alleges Defendants have collected millions of dollars
23 from. FAC ¶¶ 17, 23. Defendants did not provide
24 reports on collections to Plaintiff and denied
25 Plaintiff access to the online portal. Id. ¶ 17. In
26 November 2017, after Plaintiff repeatedly requested

27
28 ² Approximately 85% of providers from which Plaintiff
procured the specimens were California based. FAC ¶ 15.

1 payment and an accounting, Defendants e-mailed
2 Plaintiff an Excel spreadsheet "that was purportedly
3 the amount of collection [D]efendants made on
4 [P]laintiff's samples for September 2017." Id. ¶ 18.
5 However, according to Plaintiff, Defendants had
6 "materially falsified the amounts collected . . . to
7 justify not paying [P]laintiff any money for the
8 samples." Id. ¶ 19.

9 As a result, Plaintiff filed this Action against
10 Defendants, alleging negligent misrepresentation,
11 breach of implied contract, breach of oral contract,
12 common counts, unjust enrichment, and accounting. See
13 generally id.

14 **B. Procedural Background**

15 This case was Removed from Superior Court [1] to
16 this Court on May 9, 2018. Plaintiff filed its FAC
17 [13] on July 9, 2018. Defendants filed a Motion to
18 Dismiss for Lack of Personal Jurisdiction [17] and a
19 Motion to Dismiss for Failure to State a Cause of
20 Action [18] on August 13, 2018. Plaintiff filed its
21 Oppositions [19, 21] to the instant Motions on
22 September 1, 2018. On September 11, 2018, Defendants
23 filed their Replies [25, 27] to each Opposition as well
24 as Objections to the Declaration of Jamie Nocher [26,
25 28].

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II. DISCUSSION

A. Legal Standard

1. Personal Jurisdiction

When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that the Court may properly exercise jurisdiction over the defendant. Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1154 (9th Cir. 2006). Absent formal discovery or an evidentiary hearing, a plaintiff need only make a prima facie showing that jurisdiction is proper to survive dismissal. Id. at 1154.

To satisfy this burden, a plaintiff can rely on the allegations in his complaint to the extent they are not controverted by the moving party. Barantsevich v. VTB Bank, 954 F. Supp. 2d 972, 982 (C.D. Cal. 2013). If defendants adduce evidence controverting the allegations, however, the plaintiff must "come forward with facts, by affidavit or otherwise, supporting personal jurisdiction." Id. at 982 (citation omitted). "Conflicts between parties over statements contained in affidavits [or declarations] must be resolved in the plaintiff's favor." Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004).

"The general rule is that personal jurisdiction over a defendant is proper if it is permitted by a long-arm statute and if the exercise of that jurisdiction does not violate federal due process." Pebble Beach, 453 F.3d at 1154-55. California

1 authorizes jurisdiction to the full extent permitted by
2 the Constitution. See Cal. Code Civ. Proc. § 410.
3 Therefore, the only question the Court must ask is
4 whether the exercise of jurisdiction over defendants
5 would be consistent with due process. Harris Rutsky &
6 Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d
7 1122, 1129 (9th Cir. 2003).

8 Due process requires that a defendant must have
9 such "minimum contacts" with the forum state that
10 "maintenance of the suit does not offend traditional
11 notions of fair play and substantial justice." Int'l
12 Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
13 Minimum contracts requires that the defendant must have
14 purposefully availed itself of the privilege of
15 conducting activities within the foreign jurisdiction,
16 thereby invoking the benefits and protections of the
17 foreign jurisdiction's laws. See Asahi Metal Indus.
18 Co. v. Sup. Ct. of Cal., 480 U.S. 102, 109 (1987).

19 There are two recognized bases for exercising
20 jurisdiction over a nonresident defendant: (1) "general
21 jurisdiction," which arises where defendant's
22 activities in the forum are sufficiently "substantial"
23 or "continuous and systematic" to justify the exercise
24 of jurisdiction over him in all matters; and (2)
25 "specific jurisdiction," which arises when a
26 defendant's specific contacts with the forum give rise
27 to the claim in question. Helicopteros Nacionales de
28 Colombia, S.A. v. Hall, 466 U.S. 408, 414-16 (1984).

1 2. Failure to State a Claim

2 Federal Rule of Civil Procedure ("FRCP") 12(b)(6)
3 allows a party to move for dismissal of one or more
4 claims if the pleading fails to state a claim upon
5 which relief can be granted. A complaint must contain
6 sufficient facts, accepted as true, to state a
7 plausible claim for relief. Ashcroft v. Iqbal, 556
8 U.S. 662, 678 (2009) (quotation omitted). Dismissal is
9 warranted for a "lack of a cognizable legal theory or
10 the absence of sufficient facts alleged under a
11 cognizable legal theory." Balistreri v. Pacifica
12 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988)
13 (citation omitted).

14 "In ruling on a 12(b)(6) motion, a court may
15 generally consider only allegations contained in the
16 pleadings, exhibits attached to the complaint, and
17 matters properly subject to judicial notice." Swartz
18 v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007)
19 (citation omitted). A court must presume all factual
20 allegations to be true and draw all reasonable
21 inferences in favor of the non-moving party. Klarfeld
22 v. United States, 944 F.2d 583, 585 (9th Cir. 1991).
23 The question is not whether the plaintiff will
24 ultimately prevail, but whether the plaintiff is
25 entitled to present evidence to support the claims.
26 Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 184
27 (2005) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236
28 (1974)). While a complaint need not contain detailed

1 factual allegations, a plaintiff must provide more than
2 "labels and conclusions" or "a formulaic recitation of
3 the elements of a cause of action." Bell Atl. Corp. v.
4 Twombly, 550 U.S. 544, 555 (2007).

5 **B. Discussion**

6 1. Personal Jurisdiction

7 a. *Defendants' Evidentiary Objections*

8 Defendants filed objections to paragraphs six, ten,
9 and eighteen, in the Declaration of Jamie Nocher [22]
10 filed by Plaintiff. See Defs.' Objs. to Decl., ECF No.
11 26. Defendants' objections to paragraphs six and ten
12 are **OVERRULED as Moot** because the Court does not rely
13 on the evidence. Defendants' objection to paragraph
14 eighteen is **OVERRULED as Moot** with respect to the first
15 sentence,³ as it is not relied on by the Court. With
16 respect to the subsequent sentences,⁴ the objection is
17 **OVERRULED** because Nocher, the principal manager,
18 operator, and owner of Plaintiff, has personal
19 knowledge and there is no inadmissible hearsay.

20 b. *Defendants Bio Labs, Outreach, and Health*

21 i. *General Jurisdiction*

22 The Court cannot exercise general jurisdiction over
23

24 ³ "Plaintiff is informed that defendants have collected
25 millions of dollars from the 10,400 specimens plaintiff provided
and for which remain unpaid." Objs. at 3:8-12.

26 ⁴ "Whereas, plaintiff has provided and furnished defendants
27 approximately 11,000 specimens for which defendants have paid
only for 600 specimens. Since that time defendants have not
28 provided any accounting of the collections on the specimens."
Objs. at 3:12-18.

1 Defendants Bio Labs,⁵ Outreach, and Health (hereinafter
2 "Corporate Defendants"). General jurisdiction over a
3 foreign corporation is appropriate when the
4 corporation' "affiliations with the State are so
5 'continuous and systematic' as to render them
6 essentially at home in the forum State." Goodyear
7 Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915,
8 919 (2011) (citing Int'l Shoe, 326 U.S. 310, 317
9 (1945)).

10 Corporate Defendants were all organized in Florida
11 and have their principal places of business there.
12 Jurisdiction Mot. at 11:19-21. Plaintiff did not
13 oppose Defendants' argument that Corporate Defendants
14 do not regularly conduct business in California. Id.
15 at 4:6-10. Nor did Plaintiff oppose Defendants'
16 assertion that they do not have employees, nor any
17 place of business, in California. Id. at 4:6-10.
18 Thus, Corporate Defendants contacts with California are
19 not substantial enough to render them "at home" in
20 California.

21 *ii. Specific Jurisdiction*

22 The Ninth Circuit employs a three-part test to
23 determine whether a court has specific jurisdiction
24

25 ⁵ Although Defendants argue Bio Labs was not a party to the
26 alleged contract, and that it never conducted any business,
27 Plaintiff argues it entered into a contract with Bio Labs,
28 Outreach, and Health because they were allegedly held out to be
one and the same entity. Nocher Decl. at 2-4. Resolving this
conflict of statements in Plaintiff's favor, as is required at
this juncture, the Court includes Bio Labs in its analysis.

1 over a defendant:

2 (1) The non-resident defendant must purposefully
3 direct his activities or consummate some
4 transaction with the forum or resident thereof;
5 or perform some act by which he purposefully
6 avails himself of the privilege of conducting
7 activities in the forum, thereby invoking the
8 benefits and protections of its laws; (2) the
claim must be one which arises out of or relates
to the defendant's forum-related activities; and
(3) the exercise of jurisdiction must comport
with fair play and substantial justice, i.e. it
must be reasonable.

9 Mavrix Photo, Inc. v. Brand Techs., Inc., 647 F.3d
10 1218, 1227-28 (9th Cir. 2011) (citations omitted).
11 Plaintiff bears the burden of proving the first two
12 prongs, and if the Plaintiff does so, the burden shifts
13 to the Defendants to prove a "compelling case" the
14 exercise of jurisdiction would be unreasonable. Id. at
15 1228.

16 A. *Purposeful Availment*

17 "A purposeful availment analysis is most often used
18 in suits sounding in contract." Schwarzenegger, 374
19 F.3d at 802. This suit sounds primarily in contract
20 because the alleged fraud arises out of Corporate
21 Defendants' false representations that they would pay
22 Plaintiff a reasonable amount of money and provide
23 Plaintiff with accurate accounts, which are also the
24 grounds for Plaintiff's breach of contract claims. FAC
25 ¶¶ 12, 19, 30-36. See HK China Group, Inc. v. Beijing
26 United Auto & Motorcycle Mfg. Corp., 417 Fed. App'x.
27 664, 665 (9th Cir. 2011) ("Suits that include both a
28 breach of contract claim and a fraud claim may 'sound

1 primarily in contract' when the alleged fraud is merely
2 the representations in the contract that gave rise to
3 the breach."). Thus, a purposeful availment analysis
4 is proper.

5 "An out-of-state party does not purposefully avail
6 itself of a forum merely by entering into a contract
7 with a forum resident." HK China Group, Inc., 417 F.
8 App'x. at 666 (citing Burger King Corp. v. Rudzewicz,
9 471 U.S. 462, 478 (1985)). "[P]rior negotiations and
10 contemplated future consequences, along with the terms
11 of the contract and the parties' actual course of
12 dealing" are considered. Burger King, 471 U.S. at 479.

13 1. *Prior Negotiations*

14 Corporate Defendants argue that they did not
15 purposefully avail themselves of California because
16 Plaintiff initiated negotiations and met with Corporate
17 Defendants in Florida. Dawoud Decl. ¶¶ 15, 16, 20.
18 While such activity weighs against purposeful
19 availment, it is not determinative. See Hirsch v. Blue
20 Cross, Blue Shield of Kansas City, 800 F.2d 1474, 1480
21 (9th Cir. 1986) ("[T]he fact that contract negotiations
22 . . . occurred outside of California is not
23 determinative."); LocusPoint Networks, LLC v. D.T.V.,
24 LLC, No. 3:14-cv-01278-JSC, 2014 WL 3836792, at *5
25 (N.D. Cal. Aug. 1, 2014) (finding that defendant
26 solicited plaintiff's business even though plaintiff
27 initiated contact). Plaintiff responds that
28 negotiations also occurred via telephone, email, and

1 text-message, but this fact is neutral since "use of
2 the mails, telephone, or other international
3 communications simply do not qualify as purposeful
4 activity invoking the benefits and protection of the
5 [forum] state." Peterson v. Kennedy, 771 F.2d 1244,
6 1262 (9th Cir. 1985)).

7 Nonetheless, the remaining circumstances
8 surrounding negotiations support a finding of
9 purposeful availment. Plaintiff alleges Corporate
10 Defendants normally avoided doing business in
11 California but made an exception for Plaintiff "because
12 of the anticipated large volume of business it expected
13 to generate . . . knowing full well that it was
14 engaging a California business entity who had special
15 relationships with California-based providers." FAC ¶
16 11. Corporate Defendants knew the primary source of
17 specimens plaintiff would procure were from California
18 providers, and "California was the primary business-
19 source [Corporate Defendants] targeted when it engaged
20 [Plaintiff] to provide the samples." FAC ¶¶ 13, 15.
21 As such, Corporate Defendants invited Plaintiff to
22 enroll its accounts. Id. ¶ 12. See Vuori v.
23 Grasshopper Capital LLC, No. 17-cv-06362-JCS, 2018 WL
24 1014633, at *13 (N.D. Cal. Feb. 22, 2018) (finding
25 defendants solicited business in California by
26 contracting with a plaintiff defendants knew was a
27 California resident, and whose connections defendants
28 sought to benefit from).

2. *Future Consequences*

When evaluating contemplated future consequences, "courts focus on whether the defendant, in entering the contract, created 'continuing obligations between [itself] and residents of the forum.'" Calltek, Inc. v. Call Center Systems, LLC et al., No. 8:18-cv-00384-JLS-DFMx, 2018 WL 2264205, at *7 (C.D. Cal. April 25, 2018) (citing Corp. Inv. Bus. Brokers v. Melcher, 824 F.2d 786, 789 (9th Cir. 1987)). By contrast, where a contract merely involves a "lone transaction for the sale of one item" purposeful availment is not established. Boschetto v. Hansing, 539 F.3d 1011, 1017 (9th Cir. 2008).

Here, while Plaintiff did not allege a duration for the contractual relationship, the FAC supports at least more than a "lone transaction for the sale of one item." The sale of the specimens in this Action required ongoing involvement by both parties, and Plaintiff sent specimens to Corporate Defendants over at least a four-month period of time. Opp'n at 2:23-24. See LocusPoint Networks, LLC, 2014 WL 3836792, at *6 (finding the parties' continuing obligations to one another requiring "months of substantial coordination and joint effort" leaned in favor of purposeful availment). Thus, the Court can infer an ongoing contractual relationship with ties to California.

3. *Terms of Contract*

Because the contract is oral or implied, it is

unclear precisely what its terms consist of. See FAC ¶¶ 29, 34. In such instances where “[n]either party addresses whether the terms of the parties’ oral agreement favor a finding of purposeful availment in a meaningful way th[e] factor is neutral and does not weigh in favor or against a finding of purposeful availment. Vuori, 2018 WL 1014633, at *14.

4. *Course of Dealing*

With respect to actual course of dealing, “courts focus on whether the ‘substantial and continuing relationship’ with the forum resident gave the defendant ‘fair notice that he might be subject to suit’ in the forum.” Calltek, Inc., 2018 WL 2264205, at *8 (citing Burger King, 471 U.S. at 463). Corporate Defendants knew Plaintiff was a California entity that would provide specimens predominantly from California providers, and entered into a contract with Plaintiff because of business volume it was anticipated to bring. FAC ¶¶ 11-13. Moreover, Corporate Defendants “systematically delivered the necessary supplies and equipment for the samples directly to the California entities as indicated by the medical necessity forms.” Id. ¶ 16. Corporate Defendants’ knowledge of and involvement in the procurement of California-sourced specimens, reveals their contacts with California were substantial and not random. See LocusPoint Networks, LLC, 2014 WL 3836792, at *7 (citing Burger King, 471 U.S. at 480) (reiterating that the “‘quality and

1 nature' of Defendant's relationship with the company in
2 California" must be more than "random, fortuitous, or
3 attenuated."). Thus, this factor supports purposeful
4 availment.

5 Because all four factors weigh in favor of finding
6 purposeful availment, the Court finds Corporate
7 Defendants purposefully availed themselves of the
8 benefits and protections of California's laws.

9 B. *Claim Arises Out Of Forum-Related*
10 *Contacts*

11 The Ninth Circuit relies on a "'but for' test to
12 determine whether a particular claim arises out of
13 forum-related activities." Ballard v. Savage, 65 F.3d
14 1495, 1500 (9th Cir. 1995). Here, Plaintiff's claims
15 for breach of contract and false misrepresentation
16 arise out of its contractual relationship with
17 Corporate Defendants. As discussed, Corporate
18 Defendants purposefully availed themselves of
19 California law through its contract with Plaintiff.
20 "But for" the contract, this lawsuit would not have
21 arisen. See Hirsch, 800 F.2d at 1480 ("Because this
22 contract constitutes [defendant's] contacts with
23 California, the [plaintiffs] satisfy this element of
24 the jurisdictional test."). Thus, the claims arise out
25 of Corporate Defendants' forum-related contacts.

26 C. *Reasonableness*

27 If a Plaintiff satisfies the first two elements of
28 a personal jurisdiction analysis, the burden is on the

1 defendant to prove a "compelling case" that
2 jurisdiction would be unreasonable. Burger King, 471
3 U.S. at 477. Courts consider seven factors when
4 evaluating reasonableness:

5 (1) the extent of the defendant's purposeful
6 interjection into the forum state, (2) the
7 burden on the defendant in defending in the
8 forum, (3) the extent of the conflict with the
9 sovereignty of the defendant's state, (4) the
10 forum state's interest in adjudicating the
dispute, (5) the most efficient judicial
resolution of the controversy, (6) the
importance of the forum to the plaintiff's
interest in convenient and effective relief, and
(7) the existence of an alternative forum.

11 Bancroft & Masters, Inc. v. Augusta Nat. Inc., 223 F.3d
12 1082, 1088 (9th Cir. 2000) (citation omitted).

13 The only facts that favor Corporate Defendants are
14 that it would be burdensome for them to defend in
15 California, potential evidence is located in Florida,
16 and an alternative forum exists in Florida. However,
17 "modern advances in communications and transportation
18 have significantly reduced the burden on litigating" in
19 a different state. Sinatra v. Nat'l Enquirer, Inc.,
20 854 F.2d 1191, 1199 (9th Cir. 1988). See also Roth,
21 942 F.2d at 623 ("[U]nless such inconvenience is so
22 great as to constitute a deprivation of due process, it
23 will not overcome clear justifications for the exercise
24 of jurisdiction."). Moreover, the remaining factors
25 lean in favor of finding jurisdiction reasonable. On
26 balance, Corporate Defendants have not presented a
27 "compelling case" that personal jurisdiction is
28 unreasonable. Thus, the Court **DENIES** Defendants'

1 Motion to Dismiss for Lack of Personal Jurisdiction as
2 to Defendants Outreach, Health, and Bio Labs.

3 c. *Defendant Dawoud*

4 "For an individual, the paradigm forum for the
5 exercise of general jurisdiction is the individual's
6 domicile" Daimler AG v. Bauman, 571 U.S. 117,
7 137 (2014). Dawoud states that he is, and at all
8 relevant times has been, a resident and citizen of
9 Florida. Dawoud Decl. ¶ 4. Plaintiff does not dispute
10 this fact, nor even allege that Dawoud has been to
11 California. Plaintiff's allegations all are based on
12 Dawoud's actions and status as a principal of Corporate
13 Defendants. FAC ¶¶ 5,6. This is insufficient to
14 establish general personal jurisdiction over Dawoud.

15 With respect to specific jurisdiction, Plaintiff
16 has pleaded no facts to support an assertion that
17 Dawoud purposefully availed himself of conducting
18 business in California. The FAC alleges no acts
19 specifically attributed to Dawoud, nor that Dawoud was
20 a party to the alleged contract at issue. The only
21 actions attributed to Dawoud are contract negotiations
22 in which Dawoud acted as the agent and representative
23 of Outreach, Health, and Bio Labs.⁶ Nocher Decl. ¶ 4.
24 This is insufficient to establish that Dawoud, in his
25 individual capacity, should be subject to personal
26 jurisdiction in California. See Davis v. Metro Prods.,

27
28 ⁶ Importantly, Dawoud never traveled to California to engage
in such negotiations. Dawoud Decl. ¶ 21.

1 Inc., 885 F.2d 515, 520 (9th Cir. 1989) (describing the
2 fiduciary-shield doctrine—"a person's mere association
3 with a corporation that causes injury in the forum
4 state is not sufficient in itself to permit that forum
5 to assert jurisdiction over the person"); Shimmick
6 Const. Co., Inc./Obayashi Corp. v. Officine Meccaniche
7 Galletti-O.M.G. S.R.L., No. 13-cv-2700-BAS (JLB), 2014
8 WL 5847440, at *4 (S.D. Cal. Nov. 12, 2014) (same as to
9 a breach of contract claim). Thus, the Court **GRANTS**
10 Defendants' Motion to Dismiss for Lack of Personal
11 Jurisdiction as to Defendant Dawoud.

12 d. *Request for Jurisdictional Discovery*

13 Plaintiff in a footnote requests leave to conduct
14 jurisdictional discovery "to resolve those issues to
15 the Court's satisfaction." Opp'n at 8 n.8. Plaintiff
16 does not provide details regarding what the discovery
17 would establish. Because Plaintiff has failed to show
18 more than speculative allegations of attenuated
19 jurisdictional contacts "in the face of specific
20 denials made by [D]efendants" thus far, "the Court need
21 not permit even limited discovery." Terracom v. Valley
22 Nat'l Bank, 49 F.3d 555, 562 (9th Cir. 1995); see
23 Boschetto, 539 F.3d at 1020 (affirming the district
24 court's jurisdictional discovery request denial "based
25 on little more than a hunch that [discovery] might
26 yield jurisdictionally relevant facts"). Thus, the
27 Court **DENIES** Plaintiff's request as to Dawoud, and
28 **DENIES as moot** Plaintiff's request as to Corporate

1 Defendants.

2 2. Failure to State a Claim⁷

3 a. *Defendants' Evidentiary Objections*

4 Defendants object to the admissibility of the
5 Declaration of Jamie Nocher filed by Plaintiff [20].
6 See Defs.' Objs., ECF No. 28. In ruling on a 12(b)(6)
7 motion the court only considers allegations in the
8 pleadings, exhibits attached to the complaint, and
9 judicially noticed matters. Swartz, 476 F.3d at 763.
10 Thus, the Court **SUSTAINS** Defendants' objection.

11 b. *Choice of Law*

12 A federal court sitting in diversity applies the
13 choice-of-law rules of the forum state. Coneff v. AT &
14 T Corp., 673 F.3d 1155, 1161 (9th Cir. 2012). Thus,
15 the Court applies California's choice-of-law rules.
16 Here, the parties did not include a choice of law
17 provision in their alleged Agreement. Therefore, the
18 Court applies California Civil Code section 1646 and
19 section 188 of the Restatement (Second) of Conflict of
20 Laws. Rutherford v. FIA Card Services, N.A., Case No:
21 11-cv-04433 DDP MANX, 2012 WL 993885, at *2 (C.D. Cal.
22 Mar. 23, 2012) (citing Arno v. Club Med Inc., 22 F.3d
23 1464, 1469 n. 6 (1993)).

24 California Civil Code section 1646 requires that
25

26 ⁷ Because the Court finds that there is no personal
27 jurisdiction over Defendant Dawoud, the Motion to Dismiss for
28 Failure to State a Claim is moot as to Defendant Dawoud, and is
only discussed as to the remaining Corporate Defendants.

1 "[a] contract is to be interpreted according to the law
2 and usage of the place where it is to be performed; or,
3 if it does not indicate a place of performance,
4 according to the law and usage of the place where it is
5 made." Cal. Civ. Code § 1646.

6 The alleged Contract at issue consisted of the
7 following: (1) Plaintiff had to enroll itself for an
8 account with Defendants, (2) Defendants were to order
9 specimens from Plaintiff and direct Plaintiff to have
10 the specimens sent to their laboratories for testing,
11 (3) Defendants were to compile and provide Plaintiff
12 with summarized reports, (4) Defendants had to upload
13 test results to Defendants' online portal, and (5)
14 Defendants were to pay Plaintiff a specified portion of
15 the revenue received by Defendants in Florida. See FAC
16 ¶¶ 12-13. Because Defendants' principal place of
17 business is in Florida, these circumstances indicate
18 that the parties expected most of these obligations to
19 be performed in Florida.⁸ Thus, this weighs in favor of
20 applying Florida law. See Welles v. Turner
21 Entertainment, 503 F.3d 728, 738 (9th Cir. 2007) ("When
22

23 ⁸ Plaintiff argues that Defendants directed Plaintiff to
24 send anywhere from 23-50% of the samples to laboratories in
25 jurisdictions outside of Florida, including hospitals and
26 providers in Arizona, Mississippi, Montana, and Missouri. Opp'n
27 at 11:11-15. However, even assuming the truth of this assertion,
28 it does not change the analysis. Specifically, the Court notes
that at no point in time did Defendants ever request that
Plaintiff send the samples to California. Thus, in evaluating
whether California or Florida law should apply, the fact still
favors a finding that Florida has a greater relationship to the
transaction than California.

1 the contract does not expressly specify a place of
2 performance . . . the place of performance is the
3 jurisdiction in which the circumstances indicate the
4 parties expected or intended the contract to be
5 performed.").

6 Moreover, the majority of the factors courts
7 consider pursuant to section 188 of the Restatement
8 (Second), Conflict of Laws favor Florida law.⁹ First,
9 contract negotiations predominantly occurred in
10 Florida. Plaintiff initiated negotiations with
11 Defendants and had its representatives meet with
12 Defendants in Florida, while Defendants never traveled
13 to California.¹⁰ Second, as discussed above, the Court
14 can infer that the parties expected the bulk of
15 contractual duties to be performed in Florida.
16 Further, even if Defendants knew Plaintiff would
17 procure most specimens from California providers, the
18 location from which the specimens were procured was

19
20 ⁹ The Restatement (Second), Conflict of Laws § 188(1) states
21 that if parties to a contract fail to make a choice of law
22 agreement, the contract will be determined by the "law of the
23 state which, with respect to that issue, has the most significant
24 relationship to the transaction." In making such determination,
25 relevant factors include: (1) the place of contracting, (2) the
26 place of negotiation of the contract, (3) the place of
27 performance, (4) the location of the subject matter of the
28 contract, and (5) the domicile, residence, nationality, place of
incorporation, and place of business of the parties. Restatement
(Second), Conflict of Laws § 188(2).

¹⁰ In negotiating the contract, the parties also
corresponded via telephone, email, and text-message. However,
without more information about such correspondence, this fact is
neutral.

1 merely a secondary concern to Plaintiff's primary
2 task.¹¹ Lastly, the parties' domicile and place of
3 incorporation is neutral, since Plaintiff is a
4 California corporation doing business in California,
5 and Defendants are Florida entities. FAC ¶¶ 1-4.

6 In conclusion, these factors support a finding that
7 Florida has the most significant relationship to the
8 transaction.¹² Thus, Florida law applies to the
9 contractual claims at issue, which include Plaintiff's
10 claims for: (1) breach of implied contract, (2) breach
11 of oral contract, (3) common counts, (4) unjust
12 enrichment, and (5) accounting.

13 Plaintiff's remaining claims for deceit/negligent
14 misrepresentation are governed by FRCP 9(b), which
15 applies to deceit and negligent misrepresentation
16

17 ¹¹ Plaintiff alleges that "[o]n or about April 19, 2017,
18 Plaintiff enrolled an account with defendants for the sale of
19 specimens as ordered by defendants for defendants' laboratory."
20 FAC ¶ 12. (emphasis added). Importantly, Plaintiff does not say
21 that it enrolled an account for the sale of specimens *from*
22 *California*, nor even that Plaintiff was required or directly
23 ordered by Defendants to procure specimens from California.

24 ¹² After determining the state with the most significant
25 relationship to the matter, "the court then applies that
26 information to factors set out in section 6(2) of the
27 Restatement, such as the interstate system's needs, the various
28 states' respective interests in the issue, the protection of the
reasonable expectations, and that provision of uniform,
predictable results." Rutherford v. FIA Card Services, N.A., No.
CV 11-04433 DDP (MANx), 2012 WL 5830081, at *4 (C.D. Cal. Nov.
16, 2012). Because the Section 188(2) factors weigh in favor of
applying Florida law, the section 6(2) factors also weigh in
favor of Florida law. Id. (concluding that because the section
188(2) factors weighed in favor of California, the section 6(2)
factors favored application of California law).

claims in Florida and California. Lamm v. State St. Bank & Tr., 749 F.3d 938, 951 (11th Cir. 2014) ("Rule 9(b)'s heightened pleading standard applies to negligent misrepresentation claims"); Bosco Legal Servs. v. Hiscox Inc., No. EDCV 18-48-GW(SHKx), 2018 U.S. Dist. LEXIS 99384, at *21 (C.D. Cal. June 11, 2018) (citations omitted) ("It is well-established in the Ninth Circuit that both claims for fraud and negligent misrepresentation must meet Rule 9(b)'s particularity requirements.").¹³ As discussed below, Plaintiff fails to satisfy this federal pleading standard. Because the claim fails under either state's laws, the Court need not engage in a choice of law analysis for this claim.

c. *Deceit/Negligent Misrepresentation*

FRCP 9(b) requires that when "alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Plaintiff alleges that in or around early November

¹³ Some Ninth Circuit courts are divided as to whether Rule 9(b) applies to negligent misrepresentation claims generally, but courts consistently have found that where the plaintiff's claim sounds in fraud, Rule 9(b) applies. See McNeil v. Wells Fargo Bank, N.A., No. 13-5519 SC, 2014 U.S. Dist. LEXIS 165464, at * 3 (N.D. Cal. Nov. 25, 2014) (citing Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003))(holding that a claim "sounds in fraud where a plaintiff 'allege[s] a unified course of fraudulent conduct and rel[ies] entirely on that course of conduct as the basis of a claim.'"). The FAC alleges that Defendants acted knowingly and with oppression, fraud, or malice, and relies on this as the basis of the negligent misrepresentation claim. FAC ¶¶ 25-27. Thus, this claim is analyzed under Rule 9(b) per California law.

1 2017, "Defendants" provided Plaintiff by e-mail an
2 Excel spreadsheet indicating the amounts Defendant
3 collected on Plaintiff's samples for September 2017,
4 and that Defendants falsified the amounts in the
5 spreadsheet.¹⁴ Id. ¶¶ 18-20. This conclusory
6 allegation will not pass muster under Rule 9(b). See
7 Midamerica C2L, Inc. v. Siemens Energy, Inc., No.
8 6:17-cv-171-Orl-40KRS, 2017 U.S. Dist. LEXIS 53595, at
9 *9 (M.D. Fla. Apr. 7, 2017) ("[T]he plaintiff must
10 identify . . . the time, place, and person responsible
11 for each misrepresentation"); Saldate v. Wilshire
12 Credit Corp., 686 F. Supp. 2d 1051, 1065 (E.D. Cal.
13 2010) (citations omitted) ("[I]n a fraud action against
14 a corporation, a plaintiff must 'allege the names of
15 the persons who made the allegedly fraudulent
16 representations, their authority to speak, to whom they
17 spoke, what they said or wrote, and when it was said or
18 written.'"). Plaintiff does not identify who is
19 responsible for the misrepresentations, from which
20 email address the falsified spreadsheet was sent, or
21 any other such relevant information. Thus, Plaintiff's
22 allegations regarding Defendants' false representations
23 fail to adequately state a claim under the Rule 9(b)

24
25
26 ¹⁴ For example, Plaintiff alleges that "[i]n some cases, a
27 \$19,000 payment turned into 0 or \$5,000 turned into \$500." FAC ¶
28 20. Plaintiff's independent investigations show that "there were
many payments of twenty-thousand dollars (\$20,000.00) gross per
specimen paid to defendants that were never accounted for or paid
to Plaintiff." Id.

1 heightened pleading standard.

2 d. *Breach of Implied Contract*¹⁵

3 A contract implied in fact exists where "a person
4 performs services at another's request . . . and under
5 circumstances' fairly raising the presumption that the
6 parties understood and intended that compensation was
7 to be paid." Commerce P'ship 8098 Ltd. P'ship, 695
8 So.2d at 386. Plaintiff alleges Defendants ordered
9 Plaintiff to furnish approximately 11,000 specimens,
10 and Defendants have only paid for 600 specimens. FAC
11 ¶¶ 29-32. These facts sufficiently allege breach of an
12 implied in fact contract.

13 With respect to Defendants' argument that the claim
14 must be dismissed because Plaintiff fails to allege the
15 absence of an express contract, even if ultimately "the
16 law will not recognize an implied-in-fact contract
17 where an express contract exists," Baron v. Osman, 39
18 So.3d 449, 451 (Fla. Dist. Ct. App. 2010), the Court is
19 not aware of any Florida authority holding that a
20 plaintiff must affirmatively plead the absence of an
21 express contract in alleging breach of an implied in

22
23 ¹⁵ Defendants argue that it is unclear whether Plaintiff
24 alleges a breach of an implied in fact contract, or breach of an
25 implied of law contract. Mot. at 15:21-23. However, because
26 Plaintiff asserts a breach of an implied in law contract through
27 its unjust enrichment claim, it is apparent to the Court that
28 Plaintiff here asserts a claim for breach of an implied in fact
contract. See Commerce P'ship 8098 Ltd. P'ship v. Equity
Contracting Co., Inc., 695 So.2d 383 (Fla. Dist. Ct. App. 1997)
(citations omitted) (stating that Florida courts synonymously use
the term unjust enrichment "[t]o describe the cause of action
encompassed by a contract implied in law").

1 fact contract. Indeed, at the motion to dismiss stage,
2 Plaintiff can plead inconsistent claims in the
3 alternative. See id. (finding plaintiff's complaint
4 contained "sufficient allegations to establish the
5 existence of an express oral contract or, in the
6 alternative, an implied-in-fact contract."). Thus, the
7 Court **DENIES** Defendants' Motion as to this claim.

8 e. *Breach of Oral Contract*

9 A breach of contract claim requires "(1) a valid
10 contract; (2) a material breach; and (3) damages."
11 Friedman v. New York Life Ins. Co., 985 So.2d 56, 58
12 (Fla. Dist. Ct. App. 2008). To establish a valid oral
13 contract, a plaintiff must allege "offer, acceptance,
14 consideration and sufficient specification of essential
15 terms." St. Joe Corp. V. Mclver, 875 So.2d 375, 381
16 (Fla. 2004). Here, Plaintiff fails to allege essential
17 terms, such as the duration of the contract, the
18 quantity of specimen Plaintiff was to procure, or the
19 specific services Plaintiff was to provide. Further,
20 Plaintiff pleads inconsistent facts regarding the price
21 that Defendants were to pay under the contract.¹⁶ See
22 Jacksonville Port Authority v. W.R. Johnson

23
24 ¹⁶ Plaintiff incorporates the following inconsistent facts
25 in its claim for breach of oral contract: "[a]s of August 2017
26 defendants had paid plaintiff one hundred seventy thousand
27 dollars (\$170,000) for approximately 600 specimens. This
28 established an average price/specimen of \$283.33 that defendants
promised to pay plaintiff" and "defendants promised to pay
plaintiff 50% of net payment received (less 30% on hospital fees)
and then 50% of the remainder; and from which defendant also
deducted \$150.00 per paid sample." FAC ¶¶ 30, 34.

1 Enterprises, Inc., 624 So.2d 313, 315 (Fla. Dist. Ct.
2 App. 1993) ("[f]ailure to sufficiently determine
3 quality, quantity, or price may preclude the finding of
4 an enforceable agreement."). Thus, Plaintiff failed to
5 plead the existence of a valid contract as is required
6 for a breach of oral contract claim, and the Court
7 **GRANTS** Defendants' Motion as to this claim.

8 f. *Common Counts*

9 Plaintiff alleges common counts, in an action for
10 *quantum valebant* for the value of the goods provided or
11 for *indebitatus assumpsit* for the balance due on
12 specimens Plaintiff furnished to Defendants. The Court
13 notes that these are two of the common counts in
14 general assumpsit, which "have now become practically
15 obsolete." Matthews v. Matthews, 222 So.2d 282, 285
16 (Fla. Dist. Ct. App. 2nd 1969). To the extent courts
17 still recognize such claims, here they are dismissed
18 because they are repetitive of Plaintiff's unjust
19 enrichment claim, in which Plaintiff alleges the same
20 essential facts and seeks the same relief. See
21 Reliastar Life Ins. Co. v. Kiel, No.
22 3:08-CV-751-J-34MCR, 2010 WL 11507705, at *3 n.2 (M.D.
23 Fla. July 29, 2010) (quoting Moore Handley, Inc. v.
24 Major Realty Corp., 340 So.2d 1238, 1239 (Fla. Dist.
25 Ct. App. 1976)) ("The outcome is the same, whether one
26 labels the claim 'with the terminology of the old
27 common count for money had and received (*indebitatus*
28 *assumpsit*) or the more current restitution to prevent

1 unjust enrichment.'"). Thus, the Court **GRANTS**
2 Defendants' Motion as to common counts.

3 g. *Unjust Enrichment*

4 "A claim for unjust enrichment is equitable in
5 nature, and thus, is not available when there is an
6 adequate legal remedy." Reliastar Life Ins. Co., 2010
7 WL 11507705, at *3. Here, rather than plead in the
8 alternative, Plaintiff incorporates its claim for
9 breach of an express oral contract into its claim for
10 unjust enrichment. See FAC ¶ 42; Spring Air Int'l, LLC
11 v. R.T.G Furniture Corp., No. 8:10-cv-1200-T-33TGW,
12 2010 U.S. Dist. LEXIS 114490, at *6-7 (M.D. Fla. Oct.
13 19, 2010) (dismissing plaintiff's unjust enrichment
14 claim because plaintiff incorporated the allegations of
15 an express contract into its claim for unjust
16 enrichment). As a result, the Court **GRANTS** Defendants'
17 Motion as to the unjust enrichment claim.

18 h. *Accounting*

19 Plaintiff summarily states it is entitled to an
20 *accounting of all the monies and property defendants*
21 *obtained and realized from the specimens.* Id. ¶ 45.
22 In Florida, "an accounting is best understood as a
23 remedy for a cause of action, not as a cause of action
24 in its own right." Zaki Kulaibee Establishment v.
25 McFliker, 771 F.3d 1301, 1310 n.21 (11th Cir. 2014).
26 Where a complaint alleges claims for breach of contract
27 and accounting regarding the same facts, as is the case
28 here, both causes of action can only be maintained "by

1 showing 'that the accounts between the parties' are of
2 such a complicated nature that only a court of equity
3 can satisfactorily unravel them.'" Managed Care
4 Solutions, Inc. v. Essent Healthcare, Inc., 694 F.
5 Supp. 2d 1275, 1279 (S.D. Fla. 2010)(quoting Dairy
6 Queen, Inc. V. Wood, 369 U.S. 469, 478 (1962)). Here,
7 Plaintiff does not argue the accounts are so
8 complicated as to require an accounting. Thus, the
9 Court **GRANTS** Defendants' Motion regarding this claim.

10 i. *Leave to Amend*

11 A plaintiff may amend the complaint once "as a
12 matter of course" before a responsive pleading is
13 served. Fed. R. Civ. P. 15(a). After that, the "party
14 may amend the party's pleading only by leave of court
15 or by written consent of the adverse party and leave
16 shall be freely given when justice so requires." Id.
17 "Rule 15's policy of favoring amendments to pleadings
18 should be applied with 'extreme liberality.'" United
19 States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981)
20 (internal quotations and citation omitted).

21 While Plaintiff previously amended its Complaint,
22 this was not in response to the Court finding the
23 Complaint was deficient. Because the biggest issues
24 with Plaintiff's allegations are that they do not
25 contain sufficient facts or do not clarify that they
26 are being pleaded in the alternative, there is a strong
27 chance that amendment will cure these deficiencies.
28 Accordingly, the Court **GRANTS LEAVE TO AMEND.**

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DATED: November 16, 2018

s/ RONALD S.W. LEW
HONORABLE RONALD S.W. LEW
Senior U.S. District Judge